

Remarks by Jon Leibowitz
Commissioner, Federal Trade Commission
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**Navigating Between Dystopian Worlds
on Network Neutrality: With Misery and Wretchedness
on Each Side, Can We Find A Third Way?**

Let me first of all congratulate Maureen Ohlhausen and her staff for putting together a forum where many of the most important members of the Network Neutrality debate get to air their positions in front of their most knowledgeable and determined critics. This is important because, to some extent, this debate has been a battle of dystopian worlds where each side warns of the misery and wretchedness to come if we don't listen to them.

Some of these fears are legitimate. But as I have listened to the debate over the past few months, it has seemed to me that each side listens to the other side just enough to mock it. In order for us to move this debate forward, we need to listen respectfully to the worst-case scenarios identified by proponents and opponents of Net Neutrality and absorb the kernels of truth from each. I hope that the panels the rest of the day today and tomorrow will help get us to a policy solution that we can all agree with (or failing that, that at least won't keep us up at night worrying).

First though, I should say, as always, that my comments reflect only my own opinion and not the Commission's or that of any other Commissioner.

Before I talk about competing nightmare scenarios, let me talk about what we should all have in common. Consumer rights on the Internet should at the very least include the four "Internet Freedoms" identified by former FCC Chairman Powell in 2004. Consumers must be free to: (1) access their choice of legal content; (2) run any Internet applications they choose; (3) attach any device they choose to any connection in their homes; and (4) receive meaningful information regarding their service plans.

These four Internet freedoms are, it seems to me, table stakes – any set of principles regarding consumer rights on the Internet should require all companies to ante up.

The fourth freedom is particularly important to us at the FTC. Some of the most critical issues regarding the Internet involve transparency and disclosure. Will carriers slow down or interfere with applications or services? If so, will consumers be told about this before they sign up? To my mind, failure to disclose such material terms or conditions should be considered "unfair or deceptive" in violation of the FTC Act.

Beyond those four freedoms, things get more complicated. Right now, the last mile of the Internet to the consumer remains its least competitive. Nearly all homes in the US that get broadband – upwards of 98 percent – receive it either from their cable or

telephone company. Among those who do have access, many have no choice among providers because only one firm offers broadband to their community.

Some fear that this lack of competition will translate into reduced innovation elsewhere on the Internet. In one version of this dystopian world, without Net Neutrality broadband providers connect consumers to the Internet through both a slow lane and a fast lane. In this world, emerging YouTubes and eMusics may have to negotiate with these carriers – the carriers could be high toll gatekeepers – who could effectively block these new firms from reaching their own customers at a faster speed, which could mean not reaching them at all.

Taken to its logical extreme, these new companies could be required to negotiate rates and terms with every broadband provider in every neighborhood across the country simply to reach the very same consumers they can reach today. This could turn the Internet into a broadband “anti-commons,” where new applications never see the light of day even though their value to consumers could potentially far outstrip their cost, because the costs of negotiating deals with each carrier would likely exceed the profits from the services.

In this dystopian view of the future, the Internet simply runs in place, stuck where it is. It may run faster, but the available content and applications stop growing – and creativity atrophies – because of the inability of new entrants, especially, to reach consumers quickly and inexpensively over the Internet.

I focus on this world because much of the innovation that has occurred on the Web has been premised on its special economics, where once you get your content or application on the Internet, you can reach potentially – and at a low cost – hundreds of millions of people. These economics make possible the phenomenon of the “long-tail” business model. In the long-tail business model a product can succeed even if only a small percentage of people are interested in it because so many people have access. According to Chris Anderson, who coined the term, many of Amazon.com’s book sales – perhaps a quarter – come from books so unpopular that Barnes & Noble does not even carry them in their superstores. This type of business model – and the accompanying array of choices that give the Internet its vibrancy – could be threatened if cyberspace is sub-divided by broadband gatekeepers imposing a raft of fees, conditions and surcharges.

In response to this vision of misery and wretchedness, the broadband providers say: we have no incentive to treat our own customers so badly. They do have a point. For example, why would Verizon block Google if that would make consumers less interested in Verizon’s services? This argument is particularly compelling when there is competition among broadband providers – consumers could simply switch to a provider that sells better services. This notion, that consumers buy more of what they like than of what they don’t, also resonates with many at the Commission and its implications should not be ignored.

But it’s a persuasive argument only if the broadband gatekeepers have a good idea of which new Internet products and services will succeed. The success of YouTube and other firms like it is a testament to the power of competitive markets to deliver value to consumers even where that value might be hard to predict for some of us – or maybe

even for most of us. Does anyone really believe that the cable companies or the telcos could have foreseen the success of YouTube?

Frankly, broadband providers do not have a history of being particularly interested in, or good at, developing new applications or content. Whatever their theoretical incentives, the real world risk of leaving this decision in the hands of broadband providers is that they might not “get it” – and, though you could never quantify the harm, consumers would nevertheless live in a world with a less innovative, less magical Internet.

On the other hand, the broadband providers can present dystopian visions of their own. In their dystopian world, Net Neutrality would prohibit them from using their own wires in potentially the most pro-competitive ways. Many of these companies also argue that they are spending enormous sums of money to wire communities because of the profits they expect to make from selling combined television, telephone and broadband services over those wires. If they cannot charge higher prices for these services, they may not be able to justify their big investments in broadband.

To be sure, there has certainly been a lot of new investment in the last mile. We are currently in the middle of what may be an unprecedented swell of competition between two industries – cable and telephony – which have been dominant on their own turf for years, but which are now on the verge of entering each others’ markets. On the telco side, both AT&T and Verizon are spending billions to upgrade their networks with fiber, all so they can offer video in competition with the cable companies. For their part, the cable companies are working to upgrade their own networks to compete, and many are already offering telephone service. Moreover, each is expanding broadband Internet services in competition with the other.

At the same time all this is happening, many municipalities are beginning to build semi-fast networks as well – for example, Philadelphia, San Francisco and Madison, Wisconsin – often using some version of wireless networking in partnership with companies like EarthLink and Google.

All of this is good – or great – for consumers. And we should be careful not to create a policy that stops this new competition before it really gets under way.

What do I think? Well, like Rob Atkinson and Phil Weiser, many of us are looking for a “Third Way.” There should be room for broadband providers to compete and there should be incentives for them to innovate. But at the same time, my sense is that some form of Net Neutrality – some restriction on their ability to charge for tiered access – may be very important if we are going to continue to get the types of creative new content and applications from the web that we have marveled at over the past few years.

I haven’t reached any final conclusions – of course, we hold these workshops so that we can learn about an issue in greater depth – but one possible approach would use the consent order in the recent AT&T/BellSouth merger as a point of departure. In *AT&T/BellSouth*, AT&T agreed not to charge web-based application and content providers to access AT&T’s last mile connection to customers. This restriction included

some exceptions, principally relating to a television subscription service, that allow AT&T to use its own network in ways that others could not.

It seems possible that there are other services that could be provided better over a private network than over the Internet. Perhaps when a carrier can demonstrate that such use is pro-competitive, it should be allowed to do so in an unfettered way. In the AT&T/BellSouth merger, for example, AT&T wanted to use its network to compete in otherwise very concentrated cable television markets. Broadband providers could also be allowed to do more when the market for the services that it wants to sell is otherwise competitive – as might be the case if there is a third broadband pipe to the home or if unaffiliated companies provide the same service over the incumbent’s own Internet connection.

Finally, if Congress ever reaches the stage where it is close to enacting legislation on this issue – or, given existing antitrust and telecommunications law, even if it doesn’t – what agency should be the one to enforce any rules of the road? It is a question I’ve been asked frequently, especially in recent weeks. Well, the FCC is a terrific agency with loads of experience regulating the telecommunications industry, and it certainly has a major role to play. That shouldn’t change.

But with respect to broadband, it is important to remember that Net Neutrality touches at the heart of precisely what the FTC does – both consumer protection and competition. Lawmakers who are debating Net Neutrality measures in the coming months need to keep that in mind. They also need to keep in mind that we are enforcers, not regulators – though that seems as much of a strength as a weakness.

Ultimately, picking one agency to enforce Net Neutrality to the exclusion of the other is a false dichotomy. There is clearly room for both.

These are just some ideas. Doubtless you’ll hear others. And the upcoming panel, which includes the legendary Fred Kahn, is full of articulate thinkers with ideas across a philosophical spectrum.

The important thing to remember over the next day, though, is for everyone to listen to the concerns of the other side with the same degree of respect that you have listened to me. In that way we could start the process of developing a Net Neutrality policy that, even if it does not make every interest group happy, does benefit consumers and does not fulfill anyone’s worst fears of misery and wretchedness either.